Improvements to CETA and beyond

Making a milestone for modern investment protection:

Free and fair trade is a key factor to foster prosperity in Europe and throughout the world. An ambitious agreement between the EU, its Member States and Canada provides economic opportunities on both sides of the Atlantic Ocean. CETA is of strategic importance: it shapes global trade and promotes common high standards for the protection of the environment, consumers, workers and public welfare. Thus CETA will inspire the ongoing negotiations on TTIP, especially regarding Investor-State Dispute Settlement (ISDS).

We welcome the conclusion of negotiations of CETA by the EU commission, as stated at the EU-Canada summit in Ottawa in September last year. We are now in the period of legal scrubbing before a text is submitted to the Council for approval and goes through the process of ratification by the European Parliament and Member States´ legislators.

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ISDS has triggered an intensive public debate, including in the European Parliament and in some Member States´ parliaments, on the necessity and legitimacy of ISDS provisions **in TTIP, as well as** in **other** agreements like CETA. Recent cases **have raised genuine and strong concerns** that ISDS carries the risk of abusive claims which could successfully challenge sovereign legitimate public laws and regulations.

We welcome the publication of the results of the public consultation launched by the Commission. The general skepticism expressed in the consultation cannot remain unanswered. **It is crucial, that** well-founded criticism is addressed in a timely and transparent manner.

We need new principles for a modernized investment protection system. It is of utmost importance to ensure a fair balance between the interests of States and investors. We therefore advocate necessary changes which reflect this new approach. The principles and proposals that we support are in line with the four areas identified by the Commission following public consultation on investment protection and ISDS in TTIP.

First and foremost, States shall be able to keep their full capacity to regulate. **While CETA implies welcomed improvements, by clearer and more precise scope of protection standards,** we call for the clarification of "fair and equitable treatment" **and "legitimate expectations" of investors: an investor cannot expect that laws will remain unchanged and that changes in profit margins, including significant ones due to government measures, cannot in themselves constitute a breach of protection standards. Nothing should** deter parliaments from implementing legitimate public policies**. We urge that State parties retain the full right to interpret the protection standards of an agreement even after it has entered into force**. **Also, considering the existing high level of investment protection under the legal**

systems of the EU and its Member States, foreign investors shall **in principle** not be granted better **substantive** treatment than domestic investors **within the EU**. States shall be able to restructure and reschedule sovereign debts with no exposure to investment protection proceedings, clear carve-out provisions on bank resolutions shall be introduced. We will not compromise on our rights to protect core European values, such as respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, protection of health, safety and the environment, as well as cultural and linguistic diversity, media freedom and media pluralism, which should be clarified in the preamble and text of the CETA agreement, in line with the current scope of exclusion of audiovisual services and other cultural services.

The legitimacy of arbitral awards must be further enhanced in particular with regard to ethic requirements for arbitrators and transparency of investment protection procedures. We call for a new approach for enforcement of the right to regulate and investment protection. We support the creation of a new mechanism with a permanent secretariat. A Trade and Investment Court, whose task is to judge on investment protection cases, could constitute this new mechanism.

We support the introduction of an appeal mechanism, which has **the potential to rectify some of the legitimate concerns that arbitral tribunals are facing**. Appeal shall be open for all judicial decisions. This principle is well established in our legal systems and should apply also to investment protection in future agreements with investment protection provisions. An appeal mechanism will improve consistency, coherence and credibility of arbitration practice.

The choice of arbitrators should be limited to fixed pools of highly qualified arbitrators appointed by the EU, Canada and EU Member States, as far as possible qualified professional judges and academics, **while seeking to secure specialist legal expertise**. Ethic standards shall be raised with the introduction of a compulsory code of conduct for arbitrators. Mandatory disclosures requirements for third party funding should be introduced. **We need to prevent conflict of interests, for example in cases where an arbitrator in one dispute subsequently becomes a legal representative in another similar dispute, or vice-versa, for example through a "quarantine" period long enough to prevent conflict of interests.**

We strongly encourage settlement of grievances to the greatest extent possible without resort to litigation through ISDS. We stress the importance of actively promoting consultations and mediation. Abusive litigation by investors shall be tackled: frivolous claims should clearly be deterred **through** reinforcing the principle of "loser pays" where a claim is dismissed as frivolous and for example by the possibility of **penalties**.

In the new approach for investor protection, we want equal possibilities for SMEs as well as large investors. Access to dispute resolution should also be an option for SMEs investing abroad**.** They cannot afford long and costly proceedings. We propose to limit these costs for claims up to a certain amount.

Investment protection shall not allow for national court decisions to be challenged by arbitral mechanisms. Arbitral mechanisms shall not be allowed to act de facto as a "Supreme Court", **overturning national court decision**. We therefore strongly favour to introduce a clause making it mandatory to choose between arbitration and local remedies ("fork in the road" and "no U-turn").

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Our overarching objective with regards to investment arbitration is to strike the right balance between private and public interests by ensuring an appropriate level of protection for investors while, at the same time, preserving legitimate public interests. It is necessary to take action **to address concerns in the EU, but also to promote a modern and effective investment policy that allows the EU to grant a high level of protection for our investors abroad.** We encourage the European Commission to use the time ahead of us to **engage with other partners in order to** introduce these new principles in future agreements. **If successful,** we firmly believe that this will be a milestone for establishing new standards of investment protection both in favour of growth orientated investments and the preservation of the States' legitimate interests.